UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE DETROIT NEWS, INC., LIMITED PARTNER AND IT'S AGENT DETROIT NEWSPAPER PARTNERSHIP, L.P., A LIMITED PARTNERSHIP, A/K/A DETROIT MEDIA PARTNERSHIP	)	
Respondents,	)	**CASE NOS.**
	)	**07-CA-132726**
	)	**07-CA-132729**
AND	)	
THE DETROIT FREE PRESS, INC., GENERAL PARTNER AND ITS AGENT DETROIT NEWSPAPER PARTNERSHIP, L.P. A LIMITED PARTNERSHIP A/K/A DETROIT MEDIA PARTNERSHIP	)	
Respondents,	)	
V.	)	
NEWSPAPER GUILD OF DETROIT, LOCAL 34022 OF THE NEWSPAPER GUILD/CWA AFL-CIO	)	
Charging Union.	)	

REPLY BRIEF IN SUPPORT OF EXCEPTIONS OF DETROIT FREE PRESS AND DETROIT NEWSPAPER PARTNERSHIP TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

L. Michael Zinser
Glenn E. Plosa
THE ZINSER LAW FIRM, P.C.
414 Union Street, Suite 1200
Nashville, Tennessee 37219
Attorneys for the Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

On October 27, 2015, Counsel to the General Counsel filed its Answering Brief. Pursuant to Section 102.46(h) of the NLRB's Rules and Regulations, Series 8, as amended, *Free Press* and DMP (as its stipulated agent only for purposes of parking) file this Reply Brief in Support of Exceptions.

ARGUMENT

I. THE GENERAL COUNSEL ACKNOWLEDGES THAT THE ALJ DECISION IS ERROR BECAUSE THE ALJ DEEMED PARKING TO BE A MANDATORY SUBJECT OF BARGAINING.

The ALJ, in the Decision, erroneously deemed parking to be a mandatory subject of bargaining. (ALJ Dec. at 17). *Free Press* asserts that parking, in and of itself, is not a mandatory subject of bargaining. (Br. at 23-26). The General Counsel, in its Brief, does not refute this argument. Indeed, the General Counsel appears to concede this argument by claiming, "parking arrangements can constitute a mandatory subject of bargaining if the changes are 'material and substantial.' *LM Waste Service Corp.*, 360 NLRB No. 105 (2014)." (GC Br. at 26). General Counsel also misrepresents *LM Waste Serv.,* as it most certainly does not stand for the proposition that parking is necessarily a mandatory subject of bargaining. *LM Waste Serv.* reiterated the Board's holding in *Allen Ritchey*, 359 NLRB No. 40 (2012), that discretionary discipline during the negotiation of an initial contract is subject to bargaining because ***discipline*** has a "material or substantial" impact on an employee's tenure, status or earnings. 360 NLRB No. 105, Slip Op. at 11. The ***only*** reference to parking in *LM Waste Serv.* was in Footnote 19 that compared *United Parcel Service*, 336 NLRB 1134 (2001) to *Success Village Apartment*, *Inc.*, 348 NRLB 579 (2006) for the proposition that "changes that result in only 'minor

inconveniences' or eliminates mere 'token' items are not material or substantial but also that what is a token to one may have a meaning to another." 360 NLRB No. 105, Slip Op. at 11.*United Parcel Services* stood for the proposition that a company has an obligation to bargain over the effects of a material and substantial ***change*** in parking rules not the decision to move the parking lot. *See* 336 NLRB 1135 at fn. 6. Without more, the mere fact of change in parking at *Free Press* was not a mandatory subject of bargaining. The General Counsel's Brief as well as its reliance on *LM Waste Serv.* leave that proposition conceded by the General Counsel. Additionally, in contrast with *United Postal Services* and its union, *Free Press* here met and engaged in effects bargaining with the Guild. *Cf.* 336 NLRB at 1135.

II. BY ANY REASONABLE EVALUATION OF THE RECORD, *FREE FRESS* ENGAGED IN BARGAINING ON JULY 11, 2014.

A. All Components of Bargaining, Before, During and After the July 11 Meeting Reflect Bargaining Per Section 8(d) of the Act.

The General Counsel turns a blind eye to the proverbial forest, and focuses upon only the tree by asserting no bargaining occurred because of counsels' posturing in the bargaining session and because there was no overall agreement at the July 11, 2014[1] meeting. The record evidence leading up to the July 11 meeting, the events of the July 11 meeting, and the record evidence after the July 11 meeting demonstrate bargaining per Section 8(d) of the Act.

In approximately April, the Guild "became aware" of a potential change in parking concurrent with the move to a new location. (Tr. 397). On June 10, the Guild, through Grieco, sent an E-Mail inquiring about parking after the move. (J. Ex. 4). The

[1] Unless otherwise stated, all dates are from 2014.

letter including a seven-point information request to which *Free Press* fully replied. (J. Ex. 28). On June 16, 2014, Grieco inquired about dates of availability for effects bargaining. (GC Ex. 29). Between June 20 and 26, the union and *Free Press* agreed to meet on July 11, 2014 at 10:00 a.m. at the *Detroit News* Building. (J. Ex. 10-13, 15-19). On June 30, 2014, the Guild requested that the July 7 sign-up deadline be postponed. (J.Ex. 22). On June 30, 2014, *Free Press* informed the union that it was working on responding to the Guild's June 27 questions and to confirm the July 11 meeting. (J. Ex. 23). The Guild confirmed the meeting. (J. Ex. 24). On July 1, *Free Press* responded to the June 30 request to extend the deadline for parking indicating that it would be extended and a communication would be sent shortly, with a promise to forward it to Grieco. (J. Ex. 25). On July 2, 2014, the sign-up date was extended to July 21. (J. Ex. 26). This communication was forwarded to Grieco. (J. Ex. 28). Additionally, on July 2, *Free Press* answered the questions from the Guild's June 27 correspondence. (J. Ex. 29). All of these events occurred in advance of the July 11 bargaining meeting.

On July 11, 2014, *Free Press*, *News*, as well as a representative of DMP met[2] in the conference room that the parties historically used for negotiations. (Tr. 414-415, 661-662, 668-669, 727, 871). *Free Press* and *News* brought in its chief negotiators for the meeting; the Guild brought its negotiating committee to the meeting. At the meeting, the Guild presented a multipoint proposal for several changes to the parking policy and for other contract improvements. *Free Press* agreed to a proposed modification of the parking policy consistent with one aspect of the Guild's proposal. (J. Ex. 35; Tr. 591-592, 675-676, 880).

[2] This fact alone distinguishes *Pontiac Osteopathic Hosp.*, 336 NLRB 1021 (2001). (GC Br. 13).

The Guild ended the meeting, made no further proposals, and admitted the *Free Press* and *News* said each was available to discuss parking further. (Tr. 680, 685, 876, 908).

Following the meeting, the Guild's chief negotiator, Grieco, represented to the membership that the parties met "to bargain over the changes concerning employee parking," brought in "the lawyers," and the "the companies made one concession, saying that anyone with a valid handicapped parking tag will be given priority for the closer garage but will only be charged at the lower rate of the more distant garage." (J. Ex. 35; Tr. 505, 507, 769, 775).

An objective, reasonable, application of these facts yields the conclusion that the parties engaged in bargaining per Section 8(d) of the Act. The General Counsel suggests that the time spent responding to the Guild's information requests, the time spent coordinating meeting times and locations, the resources dedicated to appearing with the companies' chief negotiators ("the lawyers" as referenced by the Guild (J. Ex. 35)), the concession to one aspect of the Guild's proposal, and the statement by the Company that it was willing to continue discussing parking and the union's concerns, was all a grand ruse. This contention is unreasonable and further compels dismissing the Complaint.

B. The Admissions and Incredible Testimony of the Guild Demonstrate Bargaining Consistent with Section 8(d) of the Act.

In the same vein, the General Counsel endorses a subjective evaluation of whether the parties bargained based on what the union bargaining committee testified to believing, after the fact, after charges had been filed, and during the hearing (J. Ex. 35;GC Br. at 22), as opposed to the contemporaneous statements of Grieco, Gallagher,

and Storeygard, all of whom characterized the meeting as "bargaining" at the time of events.[3] (J. Ex. 4, 8, 20, 22; GC Ex. 29; Tr. 650, 695-696, 707, 741-742, 772).

Additionally, like the ALJ, the General Counsel attempts to downplay Grieco's damning admission that *Free Press* ***made a concession*** at the July 11 meeting. (GC Br. 19 at fn. 30; ALJ Dec at 19 fn. 8). If the incredible assertions of the ALJ and the General Counsel are to be accepted, then Grieco ***misrepresented*** the July 11 meeting to his membership – Grieco lied. If this is the case, Grieco's entire testimony is suspect. The General Counsel highlights that Grieco testified that he "probably should have phrased that differently." (Tr. 527). The question is why? Every witness testified that the first time *Free Press* announced a modification of the parking policy vis-à-vis individuals with disabilities was at the July 11 meeting. (Tr. 591-592, 674-676). It strains credulity to the outer limits to argue that bargaining did not occur consistent with Section 8(d) of the Act given the instant, objective, facts.

The General Counsel undermines its own argument and concedes that bargaining occurred at the July 11 meeting by acknowledging as a fact that "***Storeygard corroborated that Behan rejected five of the six proposals***." (GC Br. 20). Thus *Free Press* ***accepted*** one of the six aspects of the proposal – demonstrating bargaining.

C. The Guild's Only Proposal was to Modify the Existing Collective Bargaining Agreement; the Absence of any Further Proposal Amounts to Insistence on a Non-Mandatory Subject of Bargaining.

The General Counsel offers no cogent argument to rebut the fact that the ***only*** proposal made by the Guild was to amend the current Collective Bargaining Agreement.

[3] This makes Storeygard's admission that the Guild's lawyer "encouraged" her to not admit to bargaining at the July 11 meeting all the more significant, in spite of the General Counsel's attempt to argue otherwise. (Tr. 740, 747-48; GC Br. 20-21).

The General Counsel attempted to claim that Grieco, essentially, did not know what he was doing because he was "not an attorney…" (GC Br. 30). Incredibly, as well, the General Counsel asserted that the Guild "sought to preserve the status quo…" through its proposal. (GC Br. 30-31). This claim misrepresents the record. The Guild admitted that Item 1 of the Guild's proposal represented a significant change to the status quo for a number of employees because it would obligate *Free Press* to completely subsidize parking costs. (Tr. 688-689, 751-752, 825, 879). The Guild further admitted that Item 2 of its proposal represented a significant change to the status quo for a number of employees because it, too, would obligate *Free Press* to completely subsidize parking costs, as well. (*Id*.).

The Guild made one, singular, proposal[4] that it never withdrew and never modified.[5] Given the dynamics of bargaining, the single proposal made by the union, as well as the Guild's conduct during bargaining, it was within *Free Press*' rights, and imminently reasonable for *Free Press* to reject the Guild's proposal.

The General Counsel endorses the ALJ's excuse of the Guild's proposal to amend the contract as a "simple statement," that should not be considered, much less held against the Guild. (ALJ Dec. at 18). This is outrageous; the Guild's only proposal was a permissible, non-mandatory subject of bargaining. *Free Press* was well within its right to reject the Guild's proposal. *See Smurfit-Stone Container Enterprises*, 357 NLRB No. 144 at *2 (2011)(citing *Boeing Co.*, 337 NLRB 758, 762-63 (2002)(It is a violation

[4] The General Counsel vacillates between the word "proposal" and "proposals" to describe the document the Guild presented at the July 11 bargaining session. *Cf.* GC Br. 17 and 19. The Guild made one, singular, proposal. The proposal contained six aspects.
[5] The Guild never sought further bargaining after July 11, either. (Tr. 535, 591-592, 884). *See Berklee College of Music*, 362 NLRB No. 178 (August 26, 2015); *See also Chemical Solvents, Inc.*, 362 NLRB No. 164 (August 24, 2015).

of the Act "to insist on a [party]'s consent to a non-mandatory proposal as a condition of reaching agreement on mandatory bargaining subjects." *Id.* (citing *Borg-Warner Corp v. NLRB*, 356 U.S. 342, 347-49 (1958)).

The General Counsel promotes the ALJ's assertion that the Guild did not insist upon its initial proposal. (GC Br. 31). The Guild never withdrew or modified its proposal. Based on the record, and according to the ALJ and General Counsel, the ***only*** way that *Free Press* could have "bargained" was to accept the Guild's proposal. That is not bargaining, as it conflicts with Section 8(d)'s prohibition of bargaining compelling a concession by either party. *See* 29 U.S.C. §158(d). (Bargaining "does not compel either party to agree to a proposal or require the making of a concession …"). In response to the Guild's proposal, *Free Press* proposed the continuation of the status quo and the well-established past practice of the parties on the subject of parking and rejected changes to other existent contract terms. The ALJ's finding that *Free Press* did not engage in bargaining, and the General Counsel's assertions in support of that proposition, rely on the fundamentally flawed notion that because the results were not as the Guild would have liked them to be that *Free Press* did not engage in good faith effects bargaining. Not only does such a result contravene Section 8(d) of the Act, it also requires that virtually every fact before, during and after the July 11th meeting be ignored.

III. THE GENERAL COUNSEL ACKNOWLEDGES THAT THE EVENTS IN QUESTION DO NOT MEET THE STANDARDS FOR DIRECT DEALING, THUS THE ALLEGATION SHOULD BE DISMISSED.

As recognized by the ALJ and General Counsel, a direct dealing analysis requires proof of three factors: 1) communicating directly with union-represented

employees; 2) communicating for the purpose of "establishing or changing wages, hours or terms and conditions of employment or undercutting the union's role in bargaining; 2) and such communication is made to the exclusion of the union. (ALJ Dec. at 13; GC Br. 13). *Free Press* communicated with the Guild contemporaneous with union-represented employees and the Guild was not excluded from the communication.[6]

The General Counsel makes a flawed argument by claiming that *Free Press* solicited "parking selection forms from employees without prior involvement from the union" (GC Br. 13), but claims that the June 16 E-Mail was "direct dealing." (J. Ex. 6). There was no "parking selection form," as claimed by the General Counsel, in the June 16 E-mail. (GC Br. 13).[7]

The direct dealing allegation seems to emanate from Grieco's bald assertion, in his June 16 E-Mail (J. Ex. 35), that the Company engaged in direct dealing by simply communicating with employees. This cannot be the basis of an unfair labor practice and does not meet the direct dealing standard. Communicating with employees is protected by Section 8(c) of the Act. *See NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618, 89 S.Ct. 1918 23 L.Ed.2d. 547 (1969). Yet again the General Counsel appears to endorse a subjective analysis by delving into what Grieco thought, rather than examining the objective, record evidence. Grieco's personal thoughts – even if expressed in writing – do not make for a violation of the Act. The objective facts should be evaluated.

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[6] This argument does not concede that parking was a wage, hour or term and condition of employment but there is no need to address this argument further than it was addressed in *Free Press*' Brief in Support of Exceptions and this Reply Brief.

[7] The first time a form was sent to any employee was on July 7. (J. Ex. 31). This was ***after*** the July 1, 2014 communication to the Guild whereby *Free Press* agreed to the union's request to postpone the deadline to sign-up for parking to July 21. (J. Ex. 25).

In applying the direct dealing standard, no communication was made to the exclusion of the Guild; Guild President Gallagher, Guild Secretary Storeygard, and various union officials all received the June 16 E-Mail contemporaneous with bargaining unit employees.[8] (Tr. 659, 706, 772-773). Grieco is the "outside" representative of the Guild. Grieco works for Gallagher who was notified. (Tr. 691-692, 706). As previously argued, Grieco, individually, is not the Guild; simply because he did not receive an advance or contemporaneous copy of the June 16 communication does not make the communication direct dealing in violation of the Act. Additionally, seemingly forgotten by the General Counsel, is the fact that the June 16 E-Mail responded to the Guild's initial inquiry made by Guild President Gallagher. (Tr. 397, 659-660).

The General Counsel cites *Dayton Newspapers, Inc.*, 339 NLRB 650 (2003), *enfd.* in relevant part 402 F.3d 651 (6th Cir. 2005) in support of the direct dealing arguments. (GC Br. 13-14). The facts in *Dayton Newspapers* are markedly different from the instant case. In *Dayton Newspapers*, the company demanded a written, "acceptable commitment," from represented employees, individually, that they would return to work without going on strike and agreeing to not support future strikes or picketing. 339 NLRB at 653. In contrast with *Dayton Newspapers*, *Free Press* did not

[8] The General Counsel attempts to argue that Guild President Gallagher, Guild Treasurer Storeygard, and additional Guild officials who are also unit employees were not in an "official capacity" when each received the communication. This argument strains credulity; there is no dispute that Gallagher, Storeygard, and additional Guild officials received the email contemporaneous with bargaining unit employees. The General Counsel's argument contradicts the Board's *Purple Communications*, 361 NLRB No. 126 (December 11, 2014) standard that rejected a prohibition on company E-Mail systems being used for union-related E-Mails. The burden is on the General Counsel to prove the elements of a direct dealing allegation; flipping the burden onto *Free Press* to disprove allegations does not meet the direct dealing standard

solicit any employee to waive Section 7 rights, much less deal directly. Further, the 6th Circuit recognized that direct dealing encompassed undermining the union "by changing employment conditions treated in the collective bargaining agreement …" 402 F.3d at 661 (citations omitted). Again, in contrast with *Dayton Newspapers*, there is no language in the CBA between *Free Press* and the Guild that was changed through the parking policy; rather, DMP's actions were consistent with the past practice.[9] (Tr. 780-791, 795-801, 805-809; DFP Ex. 5-9). The allegation of direct dealing should be dismissed.

Finally, the General Counsel cites *Aggregate Indus.*, 359 NLRB No. 156 (2014)[10] to support the direct dealing arguments. (GC Br. 15). Again, the facts in *Aggregate Indus.* are markedly different from the instant case. In *Aggregate Indus.*, the company met directly with employees and required employees to agree to a new contract as a condition of keeping their jobs. *See* 359 NLRB No. 156, Slip Op. at 6. There is no similar fact pattern in the instant case.

CONCLUSION

WHEREFORE, for the reasons explained herein, for the reasons explained in the Brief in Support of Exceptions, and for any additional reasons deemed appropriate, DMP and *Free Press* respectfully request that NLRB Case Nos. 7-CA-132726 and 7-CA-132729 be dismissed.

[9] In addition, and unaddressed by the General Counsel, was the explicit right of DMP – expressed in the JOA – to determine what parking options would be made available.
[10] The Board set aside the case cited by the General Counsel. The Board did, however, reaffirm the case in a later Decision. *See* 361 NLRB No. 80 (October 31, 2014).

DATED: November 10, 2015
Nashville, Tennessee

Respectfully submitted,

/s/ L. Michael Zinser
L. Michael Zinser

/s/ Glenn E. Plosa
Glenn E. Plosa

THE ZINSER LAW FIRM, P.C.
414 Union St., Suite 1200
Nashville, Tennessee 37219
Telephone: 615.244.9700
Facsimile: 615.244.9734

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that this **REPLY BRIEF IN SUPPORT OF EXCEPTIONS** in NLRB Case Nos. 7-CA-132726 and 7-CA-132729 was filed electronically with the Executive Secretary, and served via Federal Express, upon the following, this 10th day of November, 2015:

Ingrid L. Kock, Counsel for the General Counsel
National Labor Relations Board
Region 7
477 Michigan Avenue, Room 300
Detroit, Michigan 48226-2543

Duane F. Ice, Esq.
(Attorney for Local 34022)
Law Office of Duane F. Ice, P.C.
26611 Woodward Avenue
Huntington Wood, MI 48070-1332

Robert M. Vercruysse, Esq.
(Attorney for *The Detroit News*)
Vercruysse, Murray and Calzone, PC
31780 Telegraph Road, Suite 200
Bingham Farms, MI 48025-3469

/s/ Glenn E. Plosa
Glenn E. Plosa